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Nos. 83-661, 83-690 and 83-906

In the Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE DENTICO and DOMINICK D'AGOSTINO,
PETITIONERS

v.

UNITED STATES OF AMERICA

WILLIAM V. MUSTO, FRANK SCARAFILE and
JOHN J. POWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

DOMINICK D'AGOSTINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED *

1. Whether alleged discrimination in the selection of grand jury forepersons resulting in the underrepresentation of women in that position provides a basis for reversal of a conviction upon an indictment returned by the grand jury.

2. Whether petitioners were denied a fair trial by incidents that occurred during the jury deliberations and polling.

3. Whether the district court infringed petitioner Musto's right of confrontation by limiting cross-examination of a key government witness and whether a consent recording made by that witness violated Musto's Fourth Amendment rights.

4. Whether the district court properly limited testimony by an expert linguist intended to show that a key government witness had "orchestrated" a taped conversation.

5. Whether the district court properly sent transcripts of taped conversations into the jury room during the course of deliberations.

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* See page 13 note 14, *infra*.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-681

LAWRENCE DENTICO and DOMINICK D'AGOSTINO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 83-690

WILLIAM V. MUSTO, FRANK SCARAFILE and JOHN J. POWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 83-806

DOMINICK D'AGOSTINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

1. Nos. 83-681 and 83-690

The opinion of the court of appeals (83-681 Pet. App. 1a-47a; also 83-690 Pet. App. A1-A23) is reported at 715 F.2d 822.[1] The opinion of the district court denying petitioners' motion to dismiss the indictment because of alleged discrimination in foreperson selection (Pet. App. 48a-111a) is reported at 540 F. Supp. 346. The opinion of the district court denying petitioners' post-trial motions seeking relief based upon events that occurred during jury deliberations and polling is not reported in either of the petition appendices, but is reported at 540 F. Supp. 318.

2. No. 83-806

The court of appeals' unpublished judgment order appears at 83-806 Pet. App. A1-A2. The transcript of the district court's oral order denying petitioner's motion to dismiss the indictment based on alleged discrimination in foreperson selection is reproduced at 83-806 Pet. App. A5. By that order, the district court adopted as its own, the district court's opinion addressing this issue in *United States* v. *Musto*, 540 F. Supp. 346, that is reproduced at 83-681 Pet. App. 48a-111a.[2]

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[1] Unless otherwise indicated, references to "Pet. App." hereinafter are to the appendix to the petition for a writ of certiorari in No. 83-681.

[2] In the district court, the prosecution addressed in Nos. 83-681 and 83-690 was styled *United States* v. *Musto*.

JURISDICTION

1. Nos. 83-681 and 83-690

The judgment of the court of appeals (Pet. App. 112a-113a; also 83-690 Pet. App. A25-A26) was entered on August 25, 1983. Petitions for rehearing were denied on September 19, 1983 (Pet. App. 115a-116a; 83-690 Pet. App. A27-A28). The petition for a writ of certiorari in No. 83-681 was filed on October 24, 1983, and that in No. 83-690 was filed on October 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

2. No. 83-806

The judgment of the court of appeals (83-806 Pet. App. A1-A2) was entered on September 27, 1983, and a petition for rehearing was denied (83-806 Pet. App. A6-A7) on October 21, 1983. The petition for a writ of certiorari was filed on November 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Nos. 83-681 and 83-690

Following denial of their motion to dismiss the indictment based upon alleged discrimination in the selection of grand jurors and grand jury forepersons and an ensuing jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), in violation of 18 U.S.C. 1962(d); engaging in a pattern of racketeering, in violation of 18 U.S.C. 1962(c); various mail and wire fraud offenses, in violation of 18 U.S.C. 1341 and 1343; extortion, in

violation of 18 U.S.C. 1951;[3] interstate travel in aid of illegal activity, in violation of 18 U.S.C. 1952; and investing the proceeds from racketeering activities in enterprises affecting interstate activities, in violation of 18 U.S.C. 1962(a).[4] Petitioners Musto, Scarafile and Powers were also convicted of income tax fraud. Petitioners Dentico and D'Agostino were sentenced to terms of imprisonment of 10 years and 8 years, respectively, and each was fined $50,000. Petitioners Musto, Powers and Scarafile were all sentenced to seven years' imprisonment. The court of appeals affirmed the convictions.

1. The evidence presented at trial, the sufficiency of which is not in dispute, showed that petitioners Dentico and D'Agostino, together with Thomas Principe, Rudolph Orlandini and the Orlando Construction Company formed a criminal enterprise that was advanced by Dentico and D'Agostino through their control of the construction company and other related entities created to oversee construction projects in Union City and North Bergen, New Jersey. Petitioners Musto, Scarafile, and Powers were local public officials in Union City who accepted bribes in return for using their authority and influence in furtherance of the enterprise's affairs.[5] The public official petitioners were shown to have awarded con-

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[3] Petitioners Dentico and D'Agostino were not charged with extortion.

[4] Petitioners Musto and Scarafile were not charged with these offenses.

[5] Musto was the mayor of Union City and also a member of the New Jersey Senate. Scarafile was the deputy chief of police of Union City. Powers was president of the Union City Board of Education.

struction contracts and tax abatements to projects in which the enterprise was interested, and to have arranged for payment to be made for the benefit of the enterprise upon fraudulent work orders. The city officials were also demonstrated to have cooperated with the enterprise in its scheme to sell an office building to Union City at a grossly inflated price. Pet. App. 5a-9a.

2. Prior to trial, petitioners moved to have the indictment dismissed, claiming that blacks and Hispanics had historically been underrepresented in grand and petit jury arrays in the District of New Jersey, and that blacks, women and persons under the age of 28 had been underrepresented in the position of grand jury foreperson and deputy foreperson. Petitioners rested their claims upon the Fifth and Sixth Amendments and the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* Pet. App. 49a-50a.

a. An evidentiary hearing was held in connection with these claims. As it pertains to the foreperson selection issue, the evidence indicated that 25 grand juries had been impaneled in the Northern Division of the District of New Jersey during the period April 1976 through July 1981. In this period, two forepersons and two deputy forepersons were black; two forepersons and three deputy forepersons were female; the balance were white males (Pet. App. 81a-82a).[6]

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[6] According to census data cited by the district court, 13% of the voting age population of the district was black and 52% female (Pet. App. 81a-82a). The evidence showed that 7.6% of the persons in the jury pool were black (Pet. App. 73a). The percentage of females in the jury pool or on the grand jury apparently is not disclosed in the record. See Pet. App. 86a & n. 7.

It was petitioners' contention that the responsibilities of the foreperson, coupled with the appointment of the foreperson by the court in the presence of the other grand jurors, confer upon the foreperson an extra measure of power and influence that could be translated into three to five votes on the grand jury (see Pet. App. 91a). To support their claim that the position of foreperson is sufficiently significant to warrant dismissal of an indictment based upon a showing of statistical underrepresentation of women or minorities in that post, petitioners presented the testimony of a social psychologist, Dr. John McConahay. Dr. McConahay suggested that the judge's appointment of the foreperson in open court conferred upon him a "selected legitimacy" which, petitioners contended, led the jurors to perceive the foreperson to be "an expert." Pet. App. 93a-94a. In his testimony, Dr. McConahay also relied upon a certain handbook of grand jury operating procedures (11/12/81 Tr. 115), and upon the deposition of a former grand jury foreman from Florida, who indicated that as foreman he had attempted to control the other jurors (Pet. App. 95a-96a; 11/12/81 Tr. 111-112). Petitioners did not seek to subpoena any of the judges of the district court to inquire as to their foreperson selection procedures and criteria (see C.A. Supp. App. 217-223).

The government challenged the testimony of Dr. McConahay on cross-examination. Dr. McConahay acknowledged that he had never served upon a grand jury, been present at an empanelment, heard a grand jury instructed or been present while a grand jury was in session. Nor did he know whether the grand jury handbook he relied upon was used in the District of New Jersey, or whether the single foreman whose

deposition was introduced had been successful in attempting to control his fellow grand jurors. Pet. App. 95a-96a; 11/12/81 Tr. 115. The government presented the testimony of the United States Attorney that grand jury forepersons in the District of New Jersey did not directly question witnesses. Rather, the Assistant United States Attorney handles the questioning and forepersons direct their questions through the prosecutor. In addition, the record indicated that the grand jury foreperson did not decide, independently of the grand jury, whether or when to issue subpoenas. Pet. App. 96a, 101a.

b. The district court denied the motions to dismiss (Pet. App. 48a-111a). The court held that petitioners, white males, have standing to challenge the grand and petit jury arrays under the Sixth Amendment and the Jury Selection and Service Act, and to challenge on Sixth Amendment grounds the underrepresentation of blacks or other groups in the position of grand jury foreperson (Pet. App. 50a-56a). However, the district court held that, as non-members of the groups allegedly subject to discrimination, petitioners had no standing to press an equal protection challenge to foreperson selection procedures (Pet. App. 56a-66a). On this point, the district court emphasized that petitioners' "fifth amendment claim is asserted on equal protection grounds" (Pet. App. 59a). The court accordingly distinguished *Peters* v. *Kiff*, 407 U.S. 493 (1972), which upheld the standing of a white defendant to challenge, upon due process and statutory grounds, the exclusion of blacks from a jury.

Applying a Sixth Amendment fair cross-section analysis, the district court recognized blacks and women as distinctive groups in the community cog-

nizable for purposes of challenges to jury composition and grand jury foreperson selection. The court also assumed, arguendo, that Hispanics are cognizable as a separate class, but held that persons between the ages of 18 and 27 are not cognizable as a separate class. Pet. App. 66a-72a.

The district court rejected petitioners' challenges to the grand and petit jury arrays, concluding that the statistical evidence did not establish a prima facie fair cross-section violation based on underrepresentation of blacks or Hispanics (Pet. App. 72a-80a). The court similarly concluded that the statistical evidence did not establish a prima facie violation with respect to representation of blacks among grand jury forepersons (Pet. App. 81a). But the court concluded that the statistics reflected significant underrepresentation of women among forepersons and deputy forepersons (Pet. App. 81a-89a).

The district court nonetheless found no sufficient basis for dismissal of petitioners' indictment, concluding that the foreperson does not exercise disproportionate influence in the deliberative process, and that underrepresentation of women among forepersons does not frustrate the values protected by the Sixth Amendment fair cross-section requirement, so long as the grand jury as a whole is properly constituted (Pet. App. 90a-111a). The district court emphasized the ministerial character of the duties assigned to the foreperson by Fed. R. Crim. P. 6(c), and of the other duties performed by the foreperson by custom in the District of New Jersey (Pet. App. 90a-91a, 96a, 101a-102a). Dr. McConahay's testimony was given little weight because it was not grounded in "direct knowledge of the way grand juries function" (Pet. App. 95a).

The court concluded (Pet. App. 110a-111a):

> [Petitioners] seek a dismissal of the indictment fairly returned by a properly constituted grand jury. Before this court should set aside the facts of such a revered body, the justification should be clear and the need manifest. There is nothing before this court which would justify it holding that the selection of grand jury forepersons by the jugdges [sic] of this court rendered the grand juries unrepresentative or caused an imbalance on the scales of justice.

The case then proceeded to trial. Petitioners were convicted upon the jury's verdict and sentenced.[7] The district court rejected a variety of motions for post-trial relief based upon incidents that occurred during jury deliberations and polling. *United States* v. *Musto*, 540 F. Supp. 318 (D. N.J. 1982).

3. The court of appeals affirmed (Pet. App. 1a-47a). The only issue raised on appeal pertaining to jury composition was the alleged underrepresentation of women among grand jury forepersons in the District of New Jersey. The court of appeals assumed, without deciding, that petitioners' statistical evidence established a prima facie case of underrepresentation of women in the post (see Pet. App. 11a n.3). But the court of appeals also agreed with the district court's assessment that forepersons exercise insufficient influence over the deliberative process of the grand jury to warrant dismissal of an indictment returned by a properly constituted grand jury because of a pattern of underrepresentation of women among forepersons (Pet. App. 10a-18a). The court

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[7] Additional facts pertaining to the trial proceedings, the jury's deliberations and the rendition of the verdict are set forth, as appropriate, in responding to the various questions presented for review in this Court.

noted that its decision was in accord with the Ninth Circuit's in *United States* v. *Coletta*, 682 F.2d 820 (1982), cert. denied, No. 82-798 (Feb. 22, 1983), and the Fourth Circuit's in *United States* v. *Hobby*, 702 F.2d 466 (1983), cert. granted, No. 82-2140 (Dec. 12, 1983). The court recognized the contrary decision in *United States* v. *Cross*, 708 F.2d 631 (11th Cir. 1983), petition for cert. pending, No. 83-1037 (filed Dec. 22, 1983), noting that forepersons in the Middle District of Georgia, whose role was considered there, apparently perform somewhat broader functions than forepersons in the District of New Jersey (Pet. App. 16a-17a). But the court also stated a more fundamental disagreement with the Eleventh Circuit (Pet. App. 17a):

> In any event, we are not persuaded that the duties performed by a federal [grand jury] foreperson confer the power to control the decision-making process of the grand jury.[8]

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[8] On appeal, petitioners premised their challenge to foreperson selection in the District of New Jersey not only upon the Sixth Amendment, and an equal protection theory under the Fifth Amendment, but also upon a due process theory under the Fifth Amendment. Petitioners complained that the district court had erroneously failed to recognize their due process argument in rejecting their Fifth Amendment claim on standing grounds. The government argued that petitioners had not preserved any Fifth Amendment due process claim. The court of appeals did not directly address this dispute. Nor did it address the government's argument, accepted by the district court, that petitioners lacked standing to assert an equal protection claim based upon discrimination against women in foreperson selection. Rather, although the court's opinion is not wholly explicit, it appears that the court of appeals bypassed all of these threshold arguments, ruling that underrepresentation of women among forepersons does not justify dismissal of an indictment upon *any* constitutional theory.

The court of appeals also rejected petitioners' other contentions raised on appeal. These included claims that the indictment charged unrelated conspiracies as a single offense (Pet. App. 18a-23a), and a variety of allegations that the district court mishandled several incidents that occurred at trial during jury deliberations, rendering the verdict, and polling of the jury (Pet. App. 23a-45a) (see pages 15-17, *infra*). A number of petitioners' claims, including most of those raised in this Court, were deemed too insubstantial to warrant discussion by the court of appeals, and were simply enumerated in an appendix to the court's opinion (see Pet. App. 10a, 46a-47a).

B. No. 83-806

After denial of his motion to dismiss the indictment and an ensuing jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of interstate transportation of stolen checks, in violation of 18 U.S.C. 2314 and 2,[9] and was sentenced to five years' imprisonment and fined $10,000.[10] The court of appeals affirmed by unpublished judgment order (83-806 Pet. App. A1-A2).

1. The evidence at trial, the sufficiency of which is not challenged, established that petitioners, along with

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[9] At trial, petitioner was acquitted by the district court on one count charging interstate travel to promote extortion, in violation of 18 U.S.C. 1952, and was acquitted by the jury on one count charging conspiracy to use extortionate means to collect a debt, in violation of 18 U.S.C. 894.

[10] The sentence imposed is to run consecutively to the sentence received by petitioner D'Agostino in the separate prosecution that underlies his petition in No. 83-681.

Salvatore Briguglio, Thomas Principe, and others,[11] needed investment money for the construction of a casino in Las Vegas, Nevada. To raise the necessary funds, they extorted money from Joseph and Charles Anastasie, two Philadelphia contractors. The Anastasie brothers were reluctant to invest with the men because of their reputed ties to the Genovese crime family. Briguglio, business agent for Teamsters Union Local 560, threatened the Anastasie brothers with "union problems" if they did not invest in the project, and petitioner, Briguglio, and Principe physically threatened them as well. Thus intimidated, Joseph Anastasie, who had just returned home following open heart surgery, gave Principe a check for $250,000, and Charles Anastasie turned over a check for an additional $50,000. Petitioner, Briguglio, and Principe returned with the checks to New Jersey, where petitioner described the techniques used to intimidate the Anastasie brothers to an associate in boastful terms.[12]

2. Prior to trial, petitioner moved to dismiss the indictment, based, inter alia, upon alleged discrimination in the selection of grand jury forepersons. The district court agreed to consider this motion on the basis of the pleadings and the testimony adduced in connection with the identical motion made by petitioner and his co-defendants in the RICO prosecution based on corrupt dealings with Union City, New Jersey, officials, that underlies the petition in Nos. 83-681 and 83-690. The district court denied the

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[11] Briguglio was murdered in 1978. Principe disappeared prior to trial (Tr. 717).

[12] See Tr. 55, 78-79, 108, 145-147, 153-154, 192, 219, 222, 226-228, 232, 238, 243-247, 255-256, 393-395, 402-404, 410-414, 651, 854-855.

motion to dismiss from the bench, adopting the district court's opinion in the earlier case as its own (83-806 Pet. App. A5). The court of appeals affirmed by unpublished judgment order, rejecting without discussion petitioner's claim that the indictment should be dismissed because of discrimination in the selection of forepersons (83-806 Pet. App. A1-A2).[13]

ARGUMENT

Petitioners raise a plethora of issues, some of which were not raised in the court of appeals.[14] Because the question whether alleged discrimination against women in the selection of grand jury forepersons provides any basis for dismissal of an indictment returned by a properly constituted grand jury or for reversal of an ensuing conviction is pending before the Court in *Hobby* v. *United States*, cert.

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[13] Although the court of appeals did not explicitly rely upon its earlier decision on this issue affirming the convictions of petitioners in Nos. 83-681 and 83-690, the judgment order entered on this appeal was rendered promptly after the denial of the petitions for rehearing in the prior case.

[14] Question 1 is presented by all three petitions addressed in this response. Questions 2-5 are presented only in No. 83-690, although petitioners in No. 83-681 purport to join in No. 83-690 to the extent it raises issues they do not address (see 83-681 Pet. 8-9). We note that Sup. Ct. R. 19.4 provides no authority for the unorthodox suggestion of the petitioners in Nos. 83-681 and 83-690 that they "join" in the petition in *Hobby* v. *United States*, cert. granted, No. 82-2140 (Dec. 12, 1983), to the extent it raises a question relating to alleged discrimination against blacks in foreperson selection. And because all of the petitioners limited their argument in the court of appeals to discrimination against women (see 83-681 Pet. App. A7), they cannot by this device place any broader claim before the Court.

granted, No. 82-2140 (Dec. 12, 1983), it would be appropriate to hold these petitions for disposition in light of a decision in *Hobby*.[15] The remainder of the

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[15] A copy of our brief at the petition stage in *Hobby* setting forth our position that that case and the Third Circuit decisions below were correctly decided, has been provided to counsel for petitioner.

It could be argued that there is no necessary conflict between the decisions below and the Eleventh Circuit decisions that petitioners cite (82-681 Pet. 14-15) as conflicting. Petitioners have placed primary reliance upon a Sixth Amendment fair cross-section theory that even the Eleventh Circuit has rejected, see *United States* v. *Perez-Hernandez*, 672 F.2d 1380, 1385 (1982), whereas the claim sustained by the Eleventh Circuit is arguably a due process claim that petitioners, in the government's view, failed to raise in the district court (see page 10 note 8, *supra*). The court of appeals, however, did not rely upon petitioners' failure to preserve a due process claim, and did not reach the question whether petitioners had standing to present an equal protection claim, holding instead that petitioners are not entitled to dismissal of their indictment on any constitutional theory. See page 10 note 8, *supra*.

Nor does the fact that petitioners in Nos. 83-681 and 83-806 explicitly present a Sixth Amendment claim in this Court (see 83-681 Pet. 1; 83-806 Pet. 1) suggest that plenary consideration is warranted in this case in addition to *Hobby*. As indicated in our brief acquiescing in *Hobby*, the petitioner there has relied upon a similarly imprecisely stated melange of arguments, and the question presented in this Court is stated in broad terms. Thus there is little reason to believe that a decision in *Hobby* will not control the common issue in these cases. We note that the course suggested here, holding these petitions for *Hobby*, is the same one we have suggested in our petition for a writ of certiorari in *United States* v. *Cross*, No. 83-1037, which raises the same issue as these cases and *Hobby*. We do not perceive any basis for granting the motion of petitioners in No. 83-690 for "consolidation" of this case with *Hobby*.

issues raised in No. 83-690 (see note 13, *supra*) are wholly fact-bound and do not warrant further review.

1.a. Petitioners in No. 83-690 object to the district court's actions and rulings after a single juror gave a negative response when the jury was polled after the verdict was initially announced (83-690 Pet. 11-28).[16] The court of appeals' comprehensive opinion, on which we rely, carefully reviewed this factually unique course of events and properly rejected petitioners' claims (Pet. App. 38a-45a).

As the court noted, the district court's decision to require further deliberations was plainly appropriate in the circumstances (Pet. App. 38a-39a). Given the circumstances and the defendants' failure to request instructions to the jury more elaborate than those given at the moment when the jury was ushered back

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[16] After the verdict was announced, during the course of a poll of the jury, the fourth juror answered "no" to the question whether the verdict that had been announced was her own. In the ensuing pandemonium, the court instructed the jury to resume deliberations. As the jury walked towards the exit, the recanting juror attempted to speak to the judge, but he held up his hand to stop her from saying more. Several minutes later, just as the court and counsel had reached agreement upon the contents of a note to be sent to the jury regarding this sequence of events, the jury sent a note asking for resumption of polling. The court thereupon began the poll anew, rejecting defense requests that the court first ask the fourth juror whether she wished to speak with the court and that the polling begin with the fifth juror. When the second poll reached the fourth juror, she responded "yes," while making certain gestures. The district court later concluded that these gestures did not indicate failure to assent to the verdict and declined to interview juror No. 4. After the jury was recalled to the courtroom to be discharged, one defense attorney asked for a poll as to each count. The court refused this request and dismissed the jury. Pet. App. 32a-37a.

out of the courtroom, the district court's instructions at this juncture cannot reasonably be faulted. Moreover, when the jury indicated that it had reached unanimity before the court could transmit an inquiry as to the need for further contact, the court properly declined to interview juror No. 4 before the polling resumed. Such an interview could easily have intruded upon the province of the jury and its absence did not prevent juror No. 4 from expressing her true views in the ensuing poll. The district judge was also best situated to determine whether the manner in which juror No. 4 assented to the verdict when polling was resumed warranted exploration. See Pet. App. 39a-45a. Finally, the decision whether to poll a jury on each count of the verdict is entrusted to the discretion of the district court. Petitioners have shown no abuse here; none of the events that underlie their contentions provides any particular reason to think that repolling of the jury in this manner would have yielded any different result. See Pet. App. 43a-44a.

b. Petitioners' argument (83-690 Pet. 29-30) that, when one juror became upset during the course of deliberations, the district court should have determined whether deliberations could lawfully continue with a jury of 11, or else ordered a mistrial, is insubstantial.[17] None of the defense counsel were will-

[17] On the third day of deliberations, the district court received a message that one of the jurors was crying because she was distressed at the separation from her husband required by sequestered deliberations. With consent of counsel, the court discussed the matter with the juror alone and off the record and learned that she was upset by certain pressures on the deliberations imposed by the foreperson. The court reported the conversation to counsel who agreed that the juror should not be excused and that the court should meet with the

ing to proceed with 11 jurors (see note 17, *supra*). Although some advocated a mistrial, others urged that deliberations continue. The course followed by the district court scrupulously protected the rights of petitioners, and no prejudice to petitioners is demonstrable, for there was no basis for declaring a mistrial. See Pet. App. 26a-32a.[18]

2. Petitioners contend (83-690 Pet. 31-42) that the trial court precluded effective cross-examination of Rudolph Orlandini, the chief government witness, and that Orlandini's surreptitious recording of conversations between himself and petitioner Musto violated Musto's Fourth Amendment rights. However, petitioner never raised these issues in the court below, and the court of appeals accordingly did not address them. See Pet. App. 10a, 46a-47a. Having failed to present his arguments to the lower court, petitioner should not be permitted to raise them now,

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juror a second time. At the second meeting, the court told the juror that he would talk to the foreman about his functions. At first, the juror responded that she did not wish to continue to serve, but, after a third meeting with the judge, she indicated that she would be willing to remain. Defense counsel thereafter proposed several alternative courses of action: some moved for a mistrial, others wanted the juror to remain and another requested a hearing. None wanted to substitute an alternate juror or proceed with 11 jurors. The court and counsel then held a brief voir dire of the juror in chambers; she responded that she would continue and be impartial. The jury continued deliberations after supplemental instructions on the role of the foreperson in deliberations were given. No counsel objected to the juror's continuing deliberations after the voir dire. Pet. App. 23a-26a.

[18] Because substitution of an alternate juror was not sought by any defendant, and was not ordered by the district court, there is no occasion to consider in this case whether Fed. R. Crim. P. 23(b) authorized that measure.

for the first time, in this Court. See, *e.g.*, *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 2-9.[19]

3. Petitioners next maintain (83-690 Pet. 42-45) that the district court erred in limiting opinion testimony by a linguist, intended to show that Orlandini had "orchestrated" the aforementioned taped conversations so as to make petitioners' innocent conversation appear inculpatory. The district court, however, set no limits upon the linguist's testimony as to the principles applicable, in his view, to assessment of the taped conversations. The court merely declined to allow him to apply these views to the actual taped dialogue. The district court plainly did not abuse its discretion by limiting this expert testimony. As the district court explained, determination of the meaning of statements made in dialogue is not outside the realm of common experience and there was no reason to believe the testimony excluded would have assisted the jury (Musto C.A. App. 232a, 234a, 235a). The court of appeals deemed petitioner's contention unworthy of discussion (see Pet. App. 46a). Plainly this fact-bound ruling warrants no further review.

4. Petitioners argue (83-690 Pet. 45-48), finally, that the trial court erred in honoring the jury's request that transcripts of the taped conversations be sent into the jury room for its use during deliberations. This contention was properly rejected by the court of appeals without discussion (Pet. App. 46a). It is generally recognized that a trial court has the discretion to give the jury copies of transcripts for

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[19] Among the questions presented listed in No. 83-690 (at ii) is whether petitioner Musto should have been granted a severance. No separate argument is made in support of the contention that a severance was required, nor did petitioner raise this claim in the court of appeals.

use in their deliberations. See *United States* v. *Sutherland*, 656 F.2d 1181, 1200 n.15 (5th Cir. 1981); *United States* v. *Koska*, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971); *United States* v. *Dorn*, 561 F.2d 1252, 1257 (7th Cir. 1977). In petitioners' case, the accuracy of all the transcripts was either stipulated or determined in a pretrial hearing. Before the transcripts were provided to the jury, the court properly instructed the jury that the evidence before them was the tapes themselves and that the transcripts were to be used only as an aid in listening to the tapes during deliberations. Petitioners did not seek supplemental instructions in this connection, and therefore may not complain that further instructions should have been given. In these circumstances, the district court's actions entailed no abuse of discretion.

CONCLUSION

The Court should dispose of these petitions in light of its decision in *Hobby* v. *United States*, No. 82-2140.

Respectfully submitted.

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